79-1673

Supreme Court, U. S.
FILED
APR 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 80-

Anthony Acavino,
Petitioner

vs.

United States of America

PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS FOR REVIEW OF THE JUDGMENT ORDER OF MARCH 24, 1980 AFFIRMING THE JUDGMENT OF CONVICTION AND SENTENCE OF JULY 13, 1979 IN THE UNITED STATES DISTRICT COURT.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

JUDGMENT ENTERED 1

STATEMENT OF JURISDICTION 2

QUESTION PRESENTED 3

STATUTE INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING WRIT OF CERTIORARI 7

CONCLUSION 11

TABLE OF CASES 12

APPENDIX A 13

Judgment of Court of Appeals for Third Circuit Affirming Judgment of Conviction and Sentence

JUDGMENT ENTERED

The Judgment of the Court of Appeals for the Third Circuit is reprinted in Appendix A hereto, infra, page 13.

STATEMENT OF JURISDICTION

Judgment of the Court of Appeals was entered on March 24, 1980. Jurisdiction of this Court is based on 28 U.S.C.S. 1254 which states as follows:

> Cases in the Court of Appeals may by reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

QUESTION PRESENTED

Whether the trial court erred when it refused to rule as inadmissible the tape recorded conversations between a confidential government informant and the Petitioner where the informant's consent to record the conversation was obtained by threatening the informant with a long period of incarceration should he withhold consent and offering immunity from prosecution and certain financial rewards in exchange for his cooperation.

STATUTE INVOLVED

Section 802 of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2511(2)(c) which provides:

> It shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire or oral communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

STATEMENT OF THE CASE

On July 13, 1979, Petitioner was found guilty on three separate incidents of distribution of a controlled substance in violation of 21 U.S.C.A. 841. Specifically, Petitioner was found guilty of distribution of methamphetamines.

The factual circumstances which led to the indictment may be traced back to the Spring of 1978 when Petitioner hired Michael Marrazzo to work as a cook in a pizza parlor which he owned in the Philadelphia area. Marrazzo had been recently released from federal prison on parole. Marrazzo had several prior convictions involving manufacture and distribution of controlled substances. Sometime in early 1978, Marrazzo engaged in illegal drug activities which came to the attention of Special Agent Kean of the Drug Enforcement Administration.

Kean warned Marrazzo that the government had enough evidence on Marrazzo to charge him with an additional series of drug offenses which would result in a long term of imprisonment on the new charges as well as revocation of parole on the back charges. Marrazzo realistically evaluated the facts and decided that cooperation with the government was better than spending more than a decade in prison.

There followed a meeting between Agent Kean, Assistant United States Attorney McBride and Marrazzo in May, 1978 at which Marrazzo agreed to cooperate with investigations conducted by the Drug Enforcement Administration as a confidential informant in exchange for which such cooperation would be brought to the attention of the Court before which Marrazzo might be tried for the illegal conduct which Kean had referred to in his earlier conversations. In late May, 1978, Marrazzo set out to accomplish what he had promised by proposing an illicit drug arrangement to the Petitioner.

Marrazzo, at the insistence of Agent Kean, told the Petitioner that he, Marrazzo, was privy to the source of all precursor materials and chemicals necessary for the production of methamphetamines. Marrazzo proposed that those chemicals would be provided to Petitioner in return for which the Petitioner would pay Marrazzo cash or methamphetamine produced as a result of the chemical precursors. Throughout May, June, and July, Marrazzo engaged in a number of telephone conversations to clarify the details of the arrangement and the essential nature of the bargain. Marrazzo recorded several of the conversations by means of equipment provided by the Drug Enforcement Administration. The tapes of those conversations contained statements which seemed to incriminate the Petitioner. During the course of the series of dealings between Marrazzo and the Petitioner, there occurred the three deliveries for which the Petitioner was charged and convicted.

REASONS FOR GRANTING WRIT OF CERTIORARI

A Writ of Certiorari should be issued in the instant case to resolve a conflict among the Circuit Courts of Appeals with respect to interpretation of the requirement that the government, before it may introduce tape recorded conversations between the accused and an informant, must first establish seven elements including the element that the consent to record the conversation was obtained from the informant voluntarily and in good faith and without any kind of inducement. Notwithstanding the three pronged test, several circuits have held that the promise of lenient treatment in exchange for the consent does not make the tape recording inadmissible; that the threat of a long prison term for one who refuses to cooperate does not make the recording inadmissible; that a payment to the informant does not make the recordings inadmissible. Notwithstanding this chain of decisions, the Courts have continuously stated that certain government conduct will preclude a finding that consent had been given voluntarily but precisely what conduct that might be is impossible to determine from the cases. Inducements, threats and other forms of coercion are used by the government to secure the "voluntary consent" of individuals to record conversations and it is respectfully suggested that the instant case would provide the forum for the interpretation of the three pronged standard of good faith, voluntary cooperation free of inducements of any kind.

The government must prove seven elements in order to have tape recorded conversations between the accused and a government informant introduced into evidence:

(1) That the tape recording device was capable of taking the conversation offered into evidence;

(2) That the operator of the device was capable and competent to operate the device;
(3) That the recording is authentic and correct;
(4) That changes, additions or deletions have not been made in the recording;
(5) That the recording had been preserved in a manner that is shown to the court;
(6) That the speakers are identified;
(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

The above rule was stated in *United States vs. McKeever* 169 F. Supp. 426, 430(S.D.N.Y. 1958). This rule was adopted by the Third Circuit Court of Appeals in *United States vs. Starks* 515 F2d 112, 121 n. 11 (3rd Cir. 1975).

The instant case does not concern the first six elements but rather deals exclusively with the standard to be applied in connection with the seventh element. The seventh element appears simple to apply on its face; however, the Courts have held that the threat of long imprisonment does not affect the voluntariness of the consent; that the promise of lenient treatment does not affect the reliability of the recording or the voluntariness of the consent; that payment to an informant does not constitute an inducement or affect voluntariness. The only guide the Courts have given is the statement appearing in the opinions that there is some level of government conduct which will make the consent involuntary and that there are certain inducements that will affect the voluntariness of the consent.

Although Six Courts of Appeals have ruled that a person's consent to recording is not made involuntary because his consent had been obtained in return for a promise of lenient treatment, not one has applied the three pronged test enunicated in *McKeever* in reaching its decision. The issue considered has been that of voluntariness only.

United States vs. Gladstone, 563 F2d 491(1st Cir. 1977);
United States vs. Silva, 449 F2d 145(1st Cir. 1971);
United States vs. Bonanno, 487 F2d 654(2nd Cir. 1973);
United States vs. Dowdy, 479 F2d 213(4th Cir. 1973);
United States vs. Ryan, 548 F2d 782(9th Cir. 1976);
United States vs. Hodge, 539 F2d 898(6th Cir. 1976);
United States vs. Acavino, 467 F. Supp. 284(1979);
United States vs. Cianfrani, 573 F2d 835(3rd Cir. 1978);

Voluntariness has been considered in terms of the degree of coercion applied by the government in connection with procuring the informant's voluntary consent to record conversations. The Courts have uniformly failed to address the issue of what constitutes an *inducement* which is one of the critical elements in the three pronged test.

In the instant case, the issue of inducement was never considered by the Court as a separate element of a three pronged test but rather as one element in determining whether the voluntariness standard had been met.

It is respectfully submitted that there is an obvious conflict between the standards established in *McKeever* and followed in *Starks* and the standards actually applied in reaching the decision.

The test to be applied is whether the conversation elicited was made voluntarily, in good faith and without any kind of inducement. Clearly, the Courts have failed to follow *Starks* in practice and have elected to apply just one test — the test of voluntariness and elected to eliminate the other two tests. It is respectfully submitted that this standard is erroneous.

In the instant case, testimony showed that the confidential informant had been threatened with a long jail term if he refused to consent to have conversations with Petitioner recorded. By the same token, the informant was offered immunity from prosecution for past offenses

and given large sums of money in exchange for cooperation and consent to record conversations with Petitioner. Under the circumstances, the Court considered whether the government's conduct made the consent involuntary but never addressed the issue of whether the failure to prosecute with the payment of reward money constitutes an inducement in violation of the three pronged standard set forth in *Starks*.

Petitioner respectfully requests issuance of a Writ of Certiorari to resolve the conflict in reasoning applied to similar cases by other Court of Appeals and also to establish a standard for the admissibility of tape recorded conversations where there is an issue as to whether the conversations were elicited with the voluntary consent of the informant, in good faith and without any inducement.

It is respectfully submitted that a three pronged test is called for in analyzing the consent issue rather than the unitary test of voluntariness used by the Court of Appeals for the Third Circuit and by the United States District Court in the instant case.

CONCLUSION

For the reason set forth above, it is respectfully requested that the Writ of Certiorari be issued.

FREDERICK C. STURM, ESQ.
Counsel for Petitioner

Dated: April 16, 1980

TABLE OF CASES

United States vs. Anthony Acavino, 467 F. Supp. 284
United States vs. Bonanno, 487 F2d 654(2nd Cir. 1973)
United States vs. Cianfrani, 573 F2d 835(3rd Cir. 1978)
United States vs. Dowdy, 479 F2d 213(4th Cir. 1973)
United States vs. Gladstone, 563 F2d 491(1st Cir. 1977)
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United States vs. McKeever, 169 F. Supp. 426(S.D.N.Y. 1958)
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United States vs. Silva, 449 F2d 145(1st Cir. 1971)
United States vs. Starks, 515 F2d 112(3rd Cir. 1975)

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2049

UNITED STATES OF AMERICA
v.
ANTHONY ACAVINO,
Appellant.
(Criminal No. 78-00301-01 — E.D. of Pa.)

Submitted Under Third Circuit Rule 12(6)
March 21, 1980
Before: SEITZ, *Chief Judge*, GARTH, and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the lower court erred when it refused to rule as inadmissible the tape recorded conversations between the confidential informant and the appellant since those communications were intercepted not consentually but by coercion of the confidential informant's assent by threats of long penal incarceration, (2) the lower court erred when it refused to dismiss Count III of the indictment since the third count of the superseding indictment had been materially changed and the charges printed therein were not available to the appellant's defense until the very day of the trial, and (3) the prosecution in its closing argument made improper remarks which were likely to have materially affected the outcome of the verdict and should, therefore, have resulted in granting the motion for new trial, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT,

SEITZ
Chief Judge

Attest:

THOMAS F. QUINN,
Clerk

Dated: March 24, 1980